THE REPORTER'S PRIVILEGE: PERSPECTIVES ON THE CONSTITUTIONAL ARGUMENT

INTRODUCTION

In June of 1970 a black reporter for the New York Times was held in contempt of court for refusing to testify as to information he had gathered form officials of the Black Panther Party concerning the Party's activities and beliefs. Asserting that he was entitled to a privilege not to divulge confidential information relayed to him in the course of his profession, Earl Caldwell took his case first to a California district court and then to a United States court of appeals where he won an impressive victory.[1] This note will examine the nature of the newsman's privilege with particular emphasis on the litigation involving Mr. Caldwell.

I. THE REPORTER'S PRIVILEGE AND THE COLLISION OF CONSTITUTIONAL VALUES

Unlike other privileges such as the attorney-client and physician-patient privileges the newsman's privilege has not been recognized at common law. However, at least fourteen states have enacted protective statutes which guarantee the reporter either an absolute or qualified privilege to refuse to disclose confidential information or sources.[2] To date, newsmen asserting the statutory privilege have met with little success although courts frequently have recognized, at least implicitly, that under certain conditions a qualified (but not an absolute) privilege may be granted. Put simply, the qualified privilege allows the witness to refuse to divulge confidential information only when the interest to be served by affording this protection outweighs the public's interest in compulsory testimony. The competing interests involved in the reporter privilege area are freedom of the press and the effective and fair administration of justice. Whenever the privilege is asserted, these values must be balanced one against the other. This balancing process is a sensitive and difficult task, for the interests in conflict are of the highest priority in our legal system.

The broad protective sweep of the first amendment as it relates to the press in the gathering of news is well documented.[3] In our legal hierarchy of values, first amendment freedoms occupy a preferred position.[4] Nonetheless, courts have often stated the rule that the first amendment is not an absolute. Thus, in the area of the newsman's privilege, freedom of the

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[1] Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

[2] D'Alemberle, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 322-330 (1968-69).

[3] Associated Press v. United States, 326 U.S. 1 (1945).

[4] *See, e.g.*, Murdoch v. Pennsylvania, 319 U.S. 105, 115 (1943); Marsh v. Alabama, 326 U.S. 501, 509 (1946).

press must be tempered by considerations of public interest in compelling testimony before courts of law. Whenever the privilege is asserted, these values collide. Thus far, courts have tipped the scales in favor of compulsory testimony and have denied the qualified privilege.

Compulsory testimony, like freedom of the press, is a fundamental principle in our form of government, and a vital element of due process. The rule is that, unless especially privileged or excepted, every citizen has a duty to give his testimony. This duty is owing to the public which, as Wigmore suggests, "has a right to every man's evidence."[5] Put another way, every litigant must be assured the aid of the court in requiring the attendance and testimony of witnesses. The Supreme Court defined the scope of the duty of compulsory testimony in *Blair v. United States*:

> . . . [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform . . . the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.[6]

The court in *Blair* recognizes that this rule is subject both to the constitutional exemption from being compelled to be a witness against oneself, and to the various privileges afforded by law which shield confidential matters from compulsory disclosure.[7] Thus, like the principle of freedom of the press, the duty of compulsory testimony is not absolute, there being allowable exemptions "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth."[8]

II. THE PRE-*CALDWELL* PRIVILEGE CASES

Since the decision in *Garland v. Torre*,[9] the first case in which the reporter privilege was asserted on first amendment grounds, courts presented with the question have been faced with the delicate task of balancing two values of high priority in our system of government. In that 1958 case, Judy Garland brought action against the Columbia Broadcasting System, Inc. (CBS) in district court. Her complaint set out two claims, one for breach of contract, and the other for allegedly false and defamatory

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[5] J. WIGMORE, EVIDENCE §§ 2190-92 (McNaughton Rev. 1961).

[6] Blair v. United States, 250 U.S. 278, 281-282 (1919). *See also*, Blackmer v. United States, 284 U.S. 421, 438 (1932).

[7] The common law recognized a husband-wife privilege and an attorney-client privilege. States have recognized by statute a priest-penitent and doctor-patient privilege. J. WIGMORE, EVIDENCE §§ 2285-96 (McNaughton Rev. 1961).

[8] United States v. Bryan, 339 U.S. 323, 331 (1950).

[9] Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

statements about her which were made, according to newspaper columnist Marie Torre, by a "network executive." In her column, titled "TV-Radio Today," Miss Torre attributed to the CBS source several statements about Judy Garland which the singer-actress alleged were highly damaging to her career. In discovery proceedings, the columnist refused to reveal the identity of the network executive. Subsequently, proceedings were instituted in federal district court to compel Miss Torre to disclose the name. When she refused, the district court entered an order holding her in contempt. This order was upheld on appeal by the second circuit.

The second circuit in *Torre* presented a classic characterization of the competing interests involved in the reporter-source privilege question. Potter Stewart, Circuit Judge at the time, stated:

> What must be determined is whether the interest to be served by compelling the testimony of the witness *in the present case* justifies some impairment of [the] First Amendment Freedom (emphasis added).[10]

This is the standard by which other courts have guided their thought, for it states succinctly the nature of the interests in conflict and emphasizes, at the same time, the importance of judging each case on its own merits; that is, the test is to be applied according to the particular circumstances under which the privilege is asserted.

The columnist contended, in *Torre*, that to compel her to reveal the source of her information, presented to her in confidence, would be to incroach upon the freedom of the press for forced disclosure, which she maintained, "would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public."[11] While the second circuit agreed that such a restraint might indeed result if Miss Torre were ordered to testify, nonetheless it emphasized that no freedoms are absolute. From this stance, the court began the task of balancing the competing policies at work and concluded, in the end, that:

> If . . . freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.[12]

The court held that Marie Torre's constitutional claim was without support and ruled that she had "no right to refuse an answer."[13]

In 1961 the question whether a reporter privilege is guaranteed under freedom of the press was raised again when the Supreme Court of Hawaii decided *In Re Goodfader's Appeal*.[14] The opinion of the Hawaii court

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[10] 259 F.2d 548 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

[11] *Id.* at 547-548.

[12] *Id.* at 549.

[13] *Id.* at 550.

[14] 367 P.2d 472 (Hawaii 1961).

echoed much of the language which Stewart had used in *Torre* and accepted the circuit court's characterization of competing interests. The plaintiff in *Goodfader* brought action against the Honolulu Civil Service Commission seeking reinstatement as personnel director of the Commission. The defendants, members of the commission, took the deposition of a newspaper reporter, Alan L. Goodfader, who had been told that an attempt would be made to fire the plaintiff. On cross-examination, Goodfader refused to reveal the source of his information. When an order was issued compelling him to testify, Goodfader again refused, contending that such an order violated his first amendment rights. The Supreme Court recognized that compulsory disclosure might, in this case, impinge on freedom of the press, but concluded, in language closely paralleling Judge Stewart's (in *Torre*):

> . . . [S]uch an impairment may not be considered of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel the attendance of witnesses and to exact their testimony if not otherwise privileged or protected.[15]

Another of the progeny of *Torre* is the 1969 case of *Adams v. Associated Press*.[16] In November of 1968, school authorities of the San Benito, Texas school system were investigating the use of marijuana and other drugs by some of their students. In a news article prepared by KGBT Radio and Television Stations, Lee Harr, news director for KGBT, reported that a source close to the school administration claimed that some fifty-one students had been expelled from San Benito schools for drug and marijuana use. Harr further stated that local police had not been called in on the investigation because the son of a high city official and the daughter of an elected county official had been involved. This news article was picked up by an Associated Press reporter who wrote up a news release which was sent to the Dallas Associated Press office. The news release was changed and modified to some extent and was eventually "killed," but not before it had been broadcast by some of the news media who were members of Associated Press. Plaintiffs, the mayor of San Benito and the County Commissioner, sued Associated Press on behalf of their son and daughter, respectively, for defamation of character, alleging Associated Press had made false and groundless accusations about their children. During the taking of Harr's deposition, the news director refused to reveal the source of his information, whereupon the district court issued an order compelling him to answer.

Not every court presented with this constitutional issue has relied on merely citing *Torre* as the court did in *Adams*, to refute the reporter's argument. A unique approach to the issue was undertaken by the Oregon

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[15] *Id.* at 480.

[16] 46 F.R.D. 439 (S.D. Texas 1969).

Supreme Court in *State v. Buchanan*.[17] In that case, Annette Buchanan, a writer for a student newspaper, had been granted interviews with seven persons who claimed to be marijuana users, on condition that she would not reveal their identities under any circumstances. Using fictitious names, she reported the results of the interviews. Called before a grand jury investigating the use of marijuana, she refused to disclose the identity of the seven persons she had talked to. She was fined for contempt and, on appeal, she pressed the first amendment claim, urging that freedom of the press necessarily included the freedom to gather news—a freedom which meant nothing without the privilege to promise anonymity to a confidential informant.

The Oregon court reasoned that news reporters have no special constitutional rights which allow them to gather information which other classes of citizens may not obtain. To create such rights for those whose business it is to gather news would be to raise equal privileges and equal protection questions. Said the court:

> Apart from the definitional difficulties in attempting to give constitutional status to a privilege for qualified news gatherers which presumably would be denied to less favored classes, there is another objection to discrimination between news gatherers and other persons. Such a practice would be potentially destructive of the very freedom that is sought to be preserved by this appeal.[18]

Although the court in the Oregon case adopted a novel approach to the constitutional issue, its holding fell squarely in line with *Torre* and *Goodfader*.

These then were the most important cases dealing with the reporter privilege question prior to the 1970 decisions in *Application of Caldwell*[19] and *Caldwell v. United States*.[20] As significant as these pre-*Caldwell* decisions were in defining the nature and scope of the balancing test, their importance was to be overshadowed by a decision announced by the Supreme Court in 1964. The decision in *New York Times v. Sullivan*,[21] presented what may be regarded as the definitive application of the balancing test. It is a decision which presents a convincing precedent for a first amendment-based reporter privilege.

III. *NEW YORK TIMES v. SULLIVAN*: A PROPER SETTING FOR THE *CALDWELL* LITIGATION

Sullivan did not deal expressly with the reporter privilege question. Nonetheless, it is a decision which vitally affects this area and indeed the

[17] 250 Ore. 244, 436 P.2d 729 (1967).

[18] 250 Ore. 244, 249, 436 P.2d 729, 731 (1967).

[19] Application of Caldwell, 311 F.Supp. 358 (N.D. Cal. 1970).

[20] Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

[21] 376 U.S. 254 (1964).

entire area of constitutional law relative to freedom of the press. The case involved a libel suit brought by a commissioner of Montgomery, Alabama, charging the *New York Times* with false statements relative to the handling of a civil rights demonstration. Prior to *Sullivan*, the Supreme Court had held, in a number of instances, that libel was not protected by the first amendment. Its holding in this case was, however, that certain kinds of libel were indeed protected by the first amendment, and that when freedom of the press collides with other rights of high priority in our legal system, freedom of the press must prevail.

The Court began by delimiting the scope and purpose of the first amendment:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N.A.A.C.P. v. Button*, 371 U.S. 415, 429. The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (D.C.S.D.-N.Y. 1943).[22]

The Court further held that a ". . . state rule of law is not saved by its allowance of the defense of truth,"[23] since "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' "[24] Based on these observations, the Supreme Court formulated the following rule of constitutional law applicable to action for libel:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement

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[22] *Id.* at 269-270.
[23] *Id.* at 278.
[24] *Id.* at 279.

> was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[25]

Since 1964 the Supreme Court has made further inroads on the common law of libel and has extended the *Sullivan* doctrine to reach the law of invasion of privacy. Thus, in *Time, Inc. v. Hill*, the Supreme Court held that a magazine could be found liable for invasion of privacy only when the statements concerning a person or persons were made with "knowing or reckless falsity."

The decision in *Sullivan* is strong and persuasive authority for the constitutional argument for the newsman's privilege, for it is a decision which elevates the value of a free press above other protectable interests. In *Sullivan* and subsequent decisions, following its lead,[26] the need for a free flow of news has justified the sacrifice of traditional rights of redress for defamation. First amendment rights assume a paramount importance in these cases. By analogy to the newsman's privilege question, "the injury to a litigant in a civil action caused by his inability to force a newsman to identify his confidential source is justified by the superior interest in the dissemination of news."[27] Because the radiations of *Sullivan* so directly touched the reporter privilege area, that case and its progeny became an important weapon in Earl Caldwell's fight for the constitutional privilege he asserted. It provided a proper setting for the *Caldwell* action.

Earl Caldwell was on permanent assignment by the New York Times to cover the Black Panthers. He became in time something of an expert in Panther activities. It was during the course of his assignment to cover the party that he was subpoenaed to appear before the grand jury which was investigating the Black Panthers. He was ordered to appear and to bring with him notes, papers and tape recordings of interviews reflecting statements made by Black Panther officials. Caldwell filed a motion to quash the subpoena, fearing that the relationship he had established with the militant group would be jeopardized if he were compelled to testify. A hearing was held in a California district court and the motion to quash was denied on the grounds that "every man" has a duty to testify before the grand jury. However, District Court Judge Zirpoli issued a protective order, having found no showing by the government of a compelling or overriding interest such as to require the reporter's testimony.[28] The protective order was based on the court's finding that the confidential relationship which Caldwell shared with the Black Panther Party would be severely damaged by compelling the reporter to testify; damage to that re-

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[25] *Id.* at 279-280.

[26] *See* Associated Press v. Walker, 388 U.S. 130 (1967); Beckley Newspaper v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968).

[27] Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 35 (1969-70).

[28] Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

lationship, the court maintained, would impair Caldwell's ability to "gather, analyze and publish news" concerning the Panthers. The protective order directed, in substance, that Caldwell "shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media."[20] The order further excused him from answering questions concerning statements made to him by Black Panther Party members, unless such statements were given to him for publication.

Following the filing of a notice of appeal by Caldwell, and the dismissal of that appeal, a new subpoena was directed to Caldwell. Again Caldwell filed a motion to quash, which motion was dismissed by Judge Zirpoli, and another protective order was issued, identical to the first protective order, but expressly directing Caldwell to appear before the grand jury. Caldwell refused to appear and was held in contempt. He then appealed to the second circuit.

The issue presented to the court of appeals in *Caldwell v. United States* was not whether the first amendment required protection in the form of a qualified privilege, but whether the protection of the witness should extend to excusing him from appearing before the grand jury. The district court had held that the government had shown no compelling or overriding national interest for Caldwell's testimony. This finding, however, did not satisfy the appellant. It was Caldwell's position that first amendment protection of the confidential relationship he enjoyed with the Black Panther Party was ineffective and illusory if he could be compelled to appear behind the closed doors of the grand jury room. His appearance, Caldwell urged, would destroy the trust and confidence he had built up over the years with members of the Party. The second circuit agreed with Caldwell's position and held that he should not be compelled to appear.

The courts in *Application of Caldwell* and *Caldwell v. United States* employed the balancing of interests test which had been so convincingly applied in *Sullivan*. Though the circumstances of the cases were dissimilar, the interests sought to be protected were basically the same. In *Sullivan* and the *Caldwell* cases, first amendment rights assume a preferred status. Other rights are sacrificed in order to guarantee the preservation of the free press and the unfettered gathering and reporting of news. In these cases the scales are tipped in favor of the newsman. We have discussed the balancing process in *Sullivan*. We turn now to a discussion of the manner in which the test is applied in the cases involving Earl Caldwell. The influence of *Sullivan* in this context cannot be minimized.

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[20] *Id.* at 362.

IV. *CALDWELL* AND THE BALANCING TEST

In both *Application of Caldwell* and *Caldwell v. United States*, the task before the court was the same "delicate and difficult task" which had faced other courts presented with the issue of the newsman's privilege: namely that of balancing the competing policy issues. In the court of appeals, Judge Merrill employed the *Torre* formula in an effort to arrive at the proper balance. On one side of the scales he placed the need for an "untrammeled press":

> The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy. . .[30]

With this view of the nature of the opposing principles involved in the privilege question, the second circuit refuted the government's contention that because the Black Panthers constantly "exploit the facilities of the news media" and depend on the mass media for their publicity, denial of the privilege would result in a serious check on the flow of the news. The court felt this argument was not responsive to the constitutional claim asserted by Caldwell for, as Judge Merrill puts it, it was "not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view."[31] The first amendment exists, Judge Merrill continued, to maximize the amount of information available to the public, not to insure merely that channels of communication are available to groups such as the Panthers.

On the other side of the scales, the court of appeals placed the grand jury's investigative power. While recognizing the historic tradition of the grand jury and the established duty of the citizens to appear before the grand jury and to give testimony, it concluded that in Caldwell's case, requiring testimony of this witness would be tantamount to converting him into "an investigative agent of the Government."[32] Imposing such a governmental function on the witness could not be justified, in the opinion of the court, "where it has not been shown to be essential to the Grand Jury inquiry."[33] This novel interpretation of the role of a newsman led the court to affirm the ruling of the district court that the first amendment required a qualified privilege for Caldwell.

The court of appeals next considered a question never before presented to a court deciding the reporter privilege issue: namely, may appellant be

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[30] 434 F.2d 1081, 1084-1085 (9th Cir. 1970).

[31] 434 F.2d 1081, 1084 (9th Cir. 1970).

[32] 434 F.2d 1081, 1086 (9th Cir. 1970).

[33] *Id.*

excused from even appearing before the grand jury because of his peculiar relationship with his source? This question of course contemplated a privilege far broader than the qualified privilege not to reveal confidential information. The privilege sought was not to attend the hearing at all and not to answer any questions, including questions relating to non-confidential information. Despite the government's vigorous opposition to the granting of such a broad privilege, the court held that Caldwell could not be compelled to appear. Judge Merrill cautioned, however, that "the rule of the case is a narrow one" since "not every source . . . is as sensitive as the Black Panther Party has been shown to be. . ."[34]

As noted earlier, courts deciding the constitutional question have agreed that in any given case whether or not the argument in favor of the privilege will be accepted depends on the outcome of a balancing test.[35] An essential element of that test, as set forth by the court of appeals in *Torre*, is that the competing interests must be weighed in terms of the particular context in which they are asserted. That is, the test must be undertaken with the view in mind that the opposing policy interests will have relatively more or less weight depending on the peculiar circumstances of the case. Both the district court in *Application of Caldwell*[36] and the higher court in *Caldwell v. United States* seemed to be aware of this requirement of the balancing test. Judge Zirpoli's issuance of the protective order was based on a finding that there was "no compelling or overriding" interest to tip the scales in favor of compelling disclosures. Likewise, court of appeals Judge Merrill reached his decision to excuse Caldwell from appearing before the grand jury only after a careful and sensitive analysis of the consequences which might result if Caldwell were forced to testify. Throughout his opinion, Judge Merrill expresses concern for the possible damage to the "tenuous and unstable" relationship between the reporter and the Panthers which Caldwell's mere presence might cause. He states:

> The relationship depends upon a trust and confidence that is constantly subject to reexamination and that depends in turn on actual knowledge of how news and information imparted have been handled and on continuing reassurance that the handling has been discreet.[37]

The court concluded from the facts that there was nothing to which the appellant could testify that was not protected by the order of the district court. Consequently, Judge Merrill reasoned that no benefit could be derived from requiring the reporter to appear before the grand jury. Quite to the contrary, the Judge reasons that because of the secrecy surrounding this grand jury probe and because of the uncertainty which such a probe

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[34] 434 F.2d 1081, 1090 (9th Cir. 1970).

[35] *See* Konigsberg v. State Bar, 366 U.S. 36, 51 (1961); and Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[36] 311 F. Supp. 358 (N.D. Cal 1970).

[37] Caldwell v. United States, 434 F.2d 1081, 1088 (9th Cir. 1970).

introduces "in the minds of those who fear a betrayal of their confidences,"[38] the mere appearance of the appellant might result in irreparable injury to the relationship between him and the Panthers. To risk such injury could not be justified unless the government could show a compelling need for the reporter's testimony. The court felt such a need had not been shown, and that Caldwell's appearance would be of no possible benefit to the grand jury. The court states:

> To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the costs to the public of excusing [Caldwell's] attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.[39]

The court of appeals makes it abundantly clear that "the rule of this case is a narrow one";[40] it makes no attempt to define the nature of the burden required of the party seeking disclosure nor of the kinds of situations which would meet that burden. Clearly, this is the appropriate stance in view of Supreme Court pronouncements on the nature of the decision making process as it relates to reporter privilege.[41] The rule of each case must always be the narrow rule. But the court does lay down a general rule to the effect that a court considering the question whether to extend the privilege to excusing appearance before an inquisitorial body must apply the same test which governs determination of whether the narrower qualified privilege should be allowed. In both situations, the government must demonstrate "a compelling need for the witness's presence before judicial process properly can issue to require attendance."[42]

Implicit in the opinion of Judge Merrill is at least one other requirement of the balancing process. That requirement is that in all cases the presumption will be made that freedom of the press extends protection to the newsman in the form of a qualified privilege. The initial determination which must be made by a court deciding the privilege question is, as Judge Stewart put it in *Torre*, "whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom [of the press]."[43] Evidence that the testimony sought is essential to the success of the proceeding and that such testimony is required in order to protect vital public interests must be produced by the party seeking disclosure in order to rebut the presumption of first amendment protection. This is the approach most likely

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[38] *Id.*

[39] 434 F.2d 1081, 1089 (9th Cir. 1970).

[40] 434 F.2d 1081, 1090 (9th Cir. 1970).

[41] *See* Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[42] 434 F.2d 1081, 1089 (9th Cir. 1970).

[43] 259 F.2d 545, 548 (2d Cir. 1958).

to prevent unnecessary and costly impairment of the free dissemination and gathering of the news.

V. THE MEANING OF "COMPELLING JUSTIFICATION"

Just resolution of the question of the constitutional privilege by use of the balancing test depends upon an analytically precise definition of the interests in collision in any given case. Of course, since the nature of these interests may vary widely from case to case, it is not possible to formulate specific rules which should govern the outcome of the court's test. Still, the court should keep in mind certain fundamental criteria necessary to a proper determination of which of the competing interests should prevail. Certainly, phrases such as "compelling interest" and "fair administration of justice" are of little benefit to the courts absent more specific criteria for determining whether first amendment rights must prevail over the interest of the public in compulsory testimony. Because of the importance of the interests at stake in the privilege question, generalized descriptions of competing interests will not suffice to insure that first amendment rights are maximized and the flow of the news is not wrongfully impeded. The following criteria may be helpful to a court in deciding which of the interests must prevail in any given case:

> . . . the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove.[44]

Thus, in any given case it may be important to consider the nature of the proceeding—that is, whether it be a civil or criminal case. Arguably, the interests at stake in a murder trial may be more worthy of protection than the interests at stake in a trial for libel. For example, suppose that a newsman's testimony is essential to the defense. Assume that without his testimony the defendant may be sentenced to death. It is not difficult to see that in such a situation the interest in compelling his testimony would be greater than it would be in a situation where, for example, the plaintiff in a civil action needs the newsman's testimony in order to collect damages for libel. An obviously important criterion to be considered is the merits of the claim or defense. There would be no justification in compelling a newsman to reveal a confidential source in order to attempt to substantiate a patently frivilous claim. Relevancy of the information which the newsman possesses is a basic criterion for, if the reporter has no information which is important to the disposition of the case, no purpose would be served by compelling him to appear before a grand jury. Finally, if the information which the newsman possesses is confidential but can be ob-

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[44] D'Alemberle, *Journalists Under the Axe*, *supra* note 2 at 339.

tained from another source, compulsory testimony could not be justified. Let us examine the extent to which these criteria and others were considered in the court of appeals' decision in *Caldwell*.

As has been noted, Caldwell was subpoenaed to testify before a grand jury investigating the activities of a militant organization. The possibility that criminal prosecutions would follow from the grand jury probe was, of course, a very real possibility. Thus, the proceedings to which Caldwell was summoned were of utmost public interest. However, the court of appeals did not feel that the importance of the proceeding was a factor sufficiently significant in itself to justify compelling Caldwell to testify before the grand jury. Rather, the court looked to other factors which they felt were of relatively more importance. An important consideration in the view of the court of appeals was the nature of the relationship between the newsman and his source. The court recognized that the relationship was a fragile one which depended to an unusual extent on mutual faith and trust. In this regard, the court referred to an affidavit from Caldwell in which the reporter asserted that compulsory disclosure would prevent him and other journalists from being admitted in to Panther circles. Also noted by the court were affidavits from other newsmen, one of whom gave a specific example of how in his own personal experience his testimony before a legally constituted body had had a "chilling effect" on his relationships with his source.[45] Judge Merrill is particularly aware that militant groups such as the Black Panthers may be far more suspicious of the "establishment press" than other groups. Because of this, he suggests that special care must be exercised in order to avoid cutting the tenuous lines of communication between newsmen and these groups. This criterion—the nature of the relationship between newsman and source—is one which belongs on the list of criteria which must be considered by courts presented with the constitutional privilege question.

The court of appeals examines another criterion which must be considered in the weighing of interests: namely, the relevancy of the information which the newsman possesses. Judge Merrill attaches great significance to Caldwell's contention that he would have nothing of importance to say to the grand jury—that is, nothing not protected by the protective order issued by the district court—if he were compelled to testify. Accepting the truth of this statement, the court reasons that to order Caldwell to appear before a secret grand jury investigation would be to compel a "barren appearance," a performance of no benefit to the grand jury. Especially in light of the fragile relationship between the reporter and his source, such a course of action was deemed to be totally unjustified.

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[45] The affidavit of *New York Times* correspondent Anthony Ripley recounted an instance in which the S.D.S. refused to allow the reporter to talk to its members because of Ripley's testimony before the Committee on Internal Security of the House of Representatives in Washington, D.C. before which committee Ripley had been subpoeaned to appear.

The court of appeals examined many of the criteria suggested earlier and added others in their effort to administer fairly the balancing test. In so doing, they avoided a pitfall of other courts which have decided the reporter privilege question. Courts in the past have not defined with sufficient precision the nature of the interests involved. The *Torre* court, for example, declined to explain exactly what it meant by the "fair administration of justice." Furthermore, the court failed to emphasize the extreme relevancy of the testimony required in order to sustain the plaintiff's claim.

Despite the fair degree of specificity with which the court of appeals in *Caldwell* looked at the factors involved in the balancing of policies, it might have suggested further standards by which the need for compulsory testimony could be measured. Though the court did not do so, it is apparent that additional standards and criteria may be of benefit to courts pressed with the privilege issue in the future.

The Department of Justice has issued a statement setting forth its guidelines for subpoenas to the news media. These guidelines are reasonable and fair and may be helpful to courts in the future. Some of the Department of Justice's guidelines are set out below:

> A. There should be sufficient reason to believe that a crime has occurred, from disclosures by nonpress sources. The Department does not approve utilizing the press as a springboard for investigations.
>
> B. There should be sufficient reason to believe that the information is essential to a successful investigation. . . . The subpoena should not be used to obtain peripheral nonessential or speculative information.
>
> C. The Government should have unsuccessfully attempted to obtain the information from alternative nonpress sources. . . .
>
> F. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged. . . .
>
> G. In any event, subpoena should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material.[46]

These criteria provide at least a point of departure, a basic check list to which reference should be made by a court deciding the privilege question.

CONCLUSION

Constitutional protection of a qualified privilege for newsmen may be justified under proper circumstances in order to maximize the free gathering and reporting of news without sacrificing the vital interests which are served by enforcing the duty of citizens to give testimony. Especially in view of the decision in *Sullivan*, a decision which has far-ranging implications in

[46] Reprinted from *New York Times*, Aug. 11, 1970, at 24.

the whole area of first amendment rights, the constitutional argument in favor of the privilege appears to be supported. However, whether the constitutional argument is accepted or not still must depend on the weighing of interests test. This test, in turn depends on the careful and exhaustive examination of the particular circumstances of the case, with reference to the criteria suggested above. Perhaps there will be other cases of extreme sensitivity which will require the court to excuse the newsman from appearance before the court or grand jury, as was done in *Caldwell*. In such cases, the question must be left to the sound and impartial discretion of the courts. It is for the courts to determine whether there are events, circumstances, and conditions which necessitate extending such a broad and important privilege to members of the news media.

Scott M. Lewis